



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL APPEAL NO. 10 OF 2018**

**IBRAHIM ADAN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in criminal case No. 6 of 2017 of the S.M. KIMANI Senior Resident Magistrate's court at Moyale)*

**JUDGMENT**

The appellant was charged with the offence of attempted defilement Contrary to Section 9 (1)(2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 1<sup>st</sup> day of April 2017 in Moyale subcounty within Marsabit County intentionally attempted to cause his penis to penetrate the vagina of IMH a girl child aged 5 years.

The trial Court convicted the appellant and sentenced him to serve 10 years imprisonment. The appeal is based on the following grounds.

- 1 That the appellant pleaded not guilty to the charges.**
- 2. That the appellant was made to undergo trial while he was unwell.**
- 3. That the trial court did not obtain a medical report showing that the appellant defiled the complainant and the appellant was not taken for medical examination.**
- 4. That the charges are false and meant to spoil the appellant's reputation.**
- 5. That the trial court erred in law and fact by failing to make a finding that the witnesses gave contradictory and conflicting testimonies.**
- 6. That the trial court erred by failing to note that there was an existing grudge between the appellant and the complainant**
- 7. That the appellant's defence was rejected without sufficient reasons.**
- 8. That the trial court erred in law and fact by failing to analyze the facts and the adduced evidence.**
- 9. That the trial court was not fair as the appellant was not provided with the witnesses statement.**

The appellant filed written submission. He submitted that the evidence was inconsistent. PW2 talked of her aunt and Hawo having been present but they were not called to testify. PW1 who was the complainant testified that she did not know why the appellant was standing as she was lying on the ground. PW2 alleged that she saw some fluid which looked like sperms on PW1's thigh, that evidence is not corroborated by another evidence. If the appellant was standing and the complainant was lying on the ground it is not clear where the alleged fluid came from. The appellant submit that the evidence by the witnesses is not tangible.

Mr. Mwangangi, learned prosecution counsel opposed the appeal. Counsel submit that the conviction is proper. The appellant never complained that he was sick. He always attended Court and was ready to proceed. The case involved an attempted defilement and there was no need for the appellant to be examined by medical officer. The victim was aged 5 years old and the appellant could not have had a grudge with a minor. The appellant told the court that he was 20 years old. The evidence is not contradictory or inconsistent. The appellant alleged

that by the time the offence was committed he was in hospital. No medical evidence was produced. Witness statements were supplied to the appellant.

This is a first appeal and the court has to evaluate the evidence afresh and makes its own conclusion. PW1 was the complainant. She was 5 years old and gave unsworn testimony. She was cross examined. She testified that she knew the appellant by the name Kambaro. On the material day the appellant asked to play with her. He took her behind their house and removed her clothes. As she was lying on the ground facing upwards the appellant removed something. The appellant had his clothes on. While lying there her mother appeared and the appellant fled from the scene. Her mother assisted her to put on her clothes. Her mother was initially inside the house.

**PW2 ZA is PW1's mother.** On 1.4.2017 at about 2.00pm the appellant went to her home. The appellant told her that he was hungry and she gave him food which he ate. She knew the appellant as his parents are her neighbours. The appellant then started playing with her two children. She heard the other child who was a toddler crying and asked PW1 to take the child to her. PW1 then went to where the appellant was. Her sister in law was around and she gave her the other child who was crying. As she was going towards the toilet behind the house she saw the appellant standing with his trouser zip open. PW1 was lying facing upwards with her dress drawn upwards to her chest. PW1's underwear had been completely removed and was lying beside her. She looked closely and saw some fluid that looked like sperms on PW1's thigh. She asked the appellant what he had done and the appellant ran away. She also saw the appellant's private parts as he had unzipped his trouser. She screamed and neighbours went to the scene. She reported the matter at the Moyale Police station. PW1 was taken to Moyale subcounty hospital for medical examination and a P3 form was failed. It is her evidence that PW1 was 5 years having born in February, 2012 and had her immunization card at home. PW2 also testified that the appellant is usually known by the name Kambaro at home and that she knew him very well. The appellant was arrested after a week.

**PW3 PC Agnes Ndinda** was attached at the Moyale Police Station. The case was reported at the station on 1.4.2017 at 3.30pm. PW1 was taken to Moyale subcounty hospital and the medical examination revealed that penetration had not been achieved. The appellant was arrested on 5.4.2017 with the help of PW1's mother and was charged with the offence. It is her further evidence that the appellant had an intravenous on the hand when he was arrested. The appellant had not reported any case of assault at the station.

**PW4 Abubakar Ali** is a Medical Doctor and was based at Moyale subcounty referral hospital. He examined PW1. He noted that there were no bruises or lacerations. The hymen was intact. He concluded that there was no penetration. He estimated PW1's to be 5 years.

The appellant gave sworn evidence. He stated that he is a turnboy employed by Moyale Raha bus company. On 1.4.2017 he cannot recall anything. On 31.3.2017 at about 2.00pm he was in Biashara area. He was taken on a motorbike by two people and taken to a bush area. There were about 30 people at that area and he was assaulted until he became unconscious. He regained consciousness at about 9.00pm and found himself admitted at Moyale subcounty hospital. He was admitted until 3.4.2017. His effort to report the crime at Moyale Police station were not fruitful and he was denied a P3 form. On 4.1.2017 he was arrested while he was still having the intravenous syringe. The complainant's family were his neighbours. When he moved to another house PW2 started having a grudge with him. PW2 promised to show him but he did not take it seriously. He is a total stranger to the allegations. He had disagreed with PW2.

The appeal raises the issue as to whether the prosecution proved its case beyond reasonable doubt against the appellant. The charge against the appellant was one of attempted defilement and not one of defilement. PW4 testified that PW1's hymen was intact. Therefore there was no need to have had the appellant medically examined. Although the appellant contend that he was made to undergo the hearing while he was unwell the records shows that the plea was taken on 6.4.2017 and the appellant tendered his defence on the 9.1.2018. This is along period of time and the appellant must have recovered from any alleged illness. The record also shows that PW1 testified on 20.9.2017. This was about 5 months after the plea was taken. There is no allegation that witness statements were not supplied to the appellant. On 16.5.2017 the appellant informed the court that he was yet to be supplied with witness statements. The matter was adjourned and the accused was to be supplied with witness statements. The appellant never complained that he had not been supplied with statements and was subsequently ready to proceed.

From the evidence of PW1, it is established that the alleged incident occurred during the day. PW1 knew the appellant by the name Kambaro. PW2 saw the appellant at the scene and even asked him what he had done to PW1. Both PW1 and PW2 testified that the appellant fled from the scene. The evidence of PW3 confirms that the incident was reported at the Moyale Police station immediately at about 3.30pm. PW2 testified that the incident occurred at about 2.00pm. PW2 had given food to the appellant that afternoon and she knew the appellant very well. The defence evidence was that the appellant was attacked on 31.3.2017 and was hospitalized. PW4 testified and the appellant never bothered to inquire from him whether he saw him at the hospital having been admitted. PW2 was not questioned about the alleged grudge between her and the appellant. There is no reason as to why PW1 and her mother would frame the appellant. I do find that the defence evidence does not raise any doubt on the prosecution case. PW2 saw the appellant on the material day and even gave him food. The evidence against the appellant is consistent and proved the case against him beyond reasonable doubt. There was no grudge between the appellant and PW2 and that is why the appellant was given food by the complainant's mother.

Given the evidence on record I do find that the prosecution proved its case beyond reasonable doubt against the appellant. The appeal lacks merit and is hereby disallowed.

The appellant is not a first offender as per the record. At the age of 20 he has already had three different cases. If the appellant does not reform, he will spend most of his time in prison. He was sentenced to serve the minimum sentence as provided under section 9(2) of the Sexual Offences Act. The sentence is proper as it is provided by the law. The appeal is hereby dismissed and the appellant shall continue serving his sentence.

**Dated, Signed and Delivered at Marsabit this 29<sup>th</sup> day of January, 2019**

**S. CHITEMBWE**

**JUDGE**